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# Supreme Court of the United States

October Term, 1973

NO. 73-657

BUDDY LLOYD COX, RONALD B. HEATON, AND CHESTER W. PALMER,
*Petitioners*

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1273, ET AL.,
*Respondents*

## BRIEF OF STEVEDORING COMPANY MEMBERS OF WEST GULF MARITIME ASSOCIATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

**To The United States Court Of Appeals For The Fifth Circuit**

ROBERT EIKEL,
*Counsel for Respondents*
Stevedoring Company Members of West Gulf Maritime Association
1442 Esperson Building
Houston, Texas 77002

EIKEL & DAVEY,
*Of Counsel*

*Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002*

## SUBJECT INDEX


| | Page |
|---|---|
| Questions Presented For Review | 2 |
| Statement Of Additional Pertinent Facts | 2 |
| Reasons Why The Writ Should Not Be Granted | 4 |
| Conclusion | 8 |


## INDEX OF AUTHORITIES

CASES


| | Page |
|---|---|
| Brickner v. Johnson Motors, 425 F.2d 75 (7 Cir. 1970) | 5 |
| Gualtieri v. Sperry Gyroscope Co., 67 F.Supp. 219 (E.D. N.Y. 1946) | 7 |
| McKinney v. Missouri-Kansas-Texas Railroad Co., 375 U.S. 265, 272, 78 S.Ct. 1222, 1227 (1958) | 6 |
| Moe v. Eastern Airlines, Inc., 246 F.2d 215 (5 Cir. 1957), cert. den. 357 U.S. 936, 78 S.Ct. 1380 (1958), reh. den. 358 U.S. 858, 79 S.Ct. 13 (1958) | 5 |
| Mouell v. Local No. 7635, 81 F.Supp. 151 (S.D. W.Va. 1948) | 7 |
| Shanahan v. Atlantic Refining Co., 294 F.2d 360 (3 Cir. 1961) | 7 |
| Tilton v. Missouri Pacific Railroad Company, 376 U.S. 175, 181, 84 S.Ct. 595, 602 (1964) | 6, 7 |
| United States v. Wimbish, 154 F.2d 773 (4 Cir. 1946) | 5 |

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**To The United States Court Of Appeals For The Fifth Circuit**

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*To The Honorable The Chief Justice And The Associate Justices Of The Supreme Court Of The United States:*

Respondents, Stevedoring Company Members of the West Gulf Maritime Association, file this their brief in opposition to the petition of Buddy Lloyd Cox, Ronald B.

Heaton, and Chester W. Palmer for writ of certiorari to the United States Court of Appeals for the Fifth Circuit and would respectfully show unto the Court as follows:

## QUESTIONS PRESENTED FOR REVIEW

In addition to (or in opposition to) the petitioners' view of the questions presented for review, these respondents respectfully add:

1. Whether a casual employee, who works upon a referral basis by the hour and who is paid by the hour, and who cannot identify any out of a number of employers for whom he may have worked, can lawfully be considered as having had a position "other than temporary".

2. Whether persons who are referred for employment through a hiring hall operated by a union can contend that the *classification system* used by the union in making referrals is the same as *employment* under the statute, where such system is *not* based upon actual, paid employment by any of numerous possible employers, not one of whom having been shown to have employed the person at any time.

## STATEMENT OF ADDITIONAL PERTINENT FACTS

As the trial Court found,

> "In order to view in proper context the various contentions of the respective parties, it is important at this point to describe in some detail the system of allocation of work employed at the Port of Houston under which the stevedore companies employ longshoremen to load and unload vessels; it is also

> important to underscore the role played by the longshore union in this work context at the times material to this lawsuit. It is undisputed that this system is basically unique in the industry, the Court being apprised that there is no precisely parallel procedure employed in any other major American port."

Further, the Court found:

> "It is essential to recognize that under this system of employment anyone can enter the hiring hall, position himself in the section for casuals in the hall and instantly be theoretically eligible for selection to work in a gang. No employment application need be made to the union or to the stevedore companies to work in a gang. No employment application need be made to the union or to the stevedore companies to work as a casual longshoreman. In the event a casual is selected for work by a gang foreman, he then reports to the stevedore company at shipside to work the particular vessel which the stevedore has contracted to load or unload. The stevedore company may reject at shipside, and thus refuse to employ any man sent to work for them by the union where proper cause can be shown. * * *"

The stipulated facts, R. 208-210, App. 21a-23a, show that petitioner Cox was attending school until June 8, 1965, and was a minor, R. 208, App. 21a, and because of this minority he could not *rightfully* under the union agreement be referred for employment until after he had left the Army, page 36 of Plaintiff's Exhibit 2, R. 211, App. 24a, " . . . Minors not to be furnished for any class of work"; that petitioner Heaton neither before or after his service worked enough hours to secure a union classification above "casual", R. 209-210, App. 22a-23a; and that the other petitioner, Palmer (whose age and school

status does not appear), in none of the years before his service induction worked enough hours to gain a higher union classification than "casual".

## REASONS WHY THE WRIT SHOULD NOT BE GRANTED

### 1.

No important questions of federal law are here presented for review. The hiring hall procedures and union seniority classification system are unique to the Port of Houston, i.e., apparently have no parallel in the country, and none of the three petitioners can contend under the facts that prior to their induction into the service they were other than "casual" longshoremen: Petitioner Cox was a minor, whose referral for employment was forbidden by the union-employers agreement, petitioner Heaton's hours of work before his years in the armed forces were not great and for the two-to-three years after such services were negligible, and petitioner Palmer for the three years before his entry into the service worked hours far short of those required to be classified as other than "casual".

The record is clear that, as the Courts below found, the union lowest classification as "casual" was designed to assure that only those persons who intended to follow as their regular occupation the occupation of working as longshoremen would seek referral through the union hall, that is to say, under the union classification system for employment referral the word "casual" is certainly in reality used like the word "temporary" is used in the statute.

It is respectfully submitted, further, that the attempt to use this case to extend the statutory purpose of assuring re-employment to returning servicemen, without loss of position because of armed forces service, to *hiring hall* referrals is no basis for contending the questions here are of legal and public importance: The statute in question speaks of *employment*, i.e., the relation between an employer and an employee. It is a gross mis-reading of the statute to equate *employment*, the engagement of a man by a certain employer to perform particular work, with an *occupation*. And here, where the record at best shows only that the petitioners worked for limited times at the *occupation* of longshore work, and the union classification for these men who worked only a limited number of hours was for *casuals*, fully applicable here are those cases which hold that to come within the statutory protection there must be "a reasonable expectation that the *employment* would be *continuous* and for an indefinite time". *Moe v. Eastern Airlines, Inc.*, 246 F.2d 215 (5 Cir. 1957), cert. den. 357 U.S. 936, 78 S.Ct. 1380 (1958), reh. den. 358 U.S. 858, 79 S.Ct. 13 (1958); *United States v. Wimbish*, 154 F.2d 773 (4 Cir. 1946); and *Brickner v. Johnson Motors*, 425 F.2d 75 (7 Cir. 1970).

The union classification system was clearly designed to differentiate between those who came to the hiring hall with the expectation of permanently making their livings in the occupation of longshore work, and in classifying those working only a few hours a years as "casuals", and certainly there can be no doubt that "casual" and "temporary" are words of like meaning. The fact decisions of the Courts below in substance so hold.

And of course in the decisions below the Courts expressly recognized the similarity (or identity) of *casual*

employment with *temporary* employment, and hence there is no reasonable basis for the contention that there is any conflict with decisions of other Courts of Appeal.

**2.**

But even if one ignores the manifest difference between *employment* and following an occupation, and employment by a company and a classification system for referral at the union-operated hiring hall, it is settled that where the holding of a position, and promotion, rests upon the exercise of discretion, a returning veteran is not entitled to assignment to a position higher than he held before departure for the armed forces. *McKinney v. Missouri-Kansas-Texas Railroad Co.*, 375 U.S. 265, 272, 78 S.Ct. 1222, 1227 (1958). In reaching his decision, the trial Court scrupulously followed the rule of this case, finding, at 343 F.Supp. 1299-1300, that

> ". . . The selection of casuals for any work at all is a result of a daily exercise of supervisory discretion performed by numerous gang foremen throughout the year.",

stating further that numerous factors enter into the gang foreman's choices from among casuals seeking referrals, casuals whose excessive numbers require the exercise of such discretion.

Nor can there be any doubt of the correct application of the *Tilton-Missouri Pacific Railroad Company*, 376 U.S. 175, 181, 84 S.Ct. 595, 602 (1964), "foresight-hindsight" test: The Court noted that work was not available for all casuals, and it concluded that to test the expectation of seeking to follow permanently the occupation

of a longshoreman the union's classification for casuals was quite reasonable, and the Court applied carefully the *Tilton* rule to the facts of this case.

**3.**

Finally, no question of statutory construction is here present sufficiently important to warrant the grant of the writ here sought:

The statute in question is designed to assure a serviceman that he can return to his former *employment* without being penalized for having served his country. The statute does *not* even attempt to secure a serviceman's return upon equal terms to his former *occupation.*

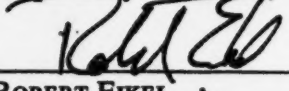
There is *no* evidence of any kind that any of the three petitioners at any time worked for any particular one of the numerous stevedoring company employers who are here respondents. The cases uniformly hold the serviceman is entitled to return on equal terms to an *employer* by whom before entering the service he was permanently employed. *Shanahan v. Atlantic Refining Co.*, 294 F.2d 360 (3 Cir. 1961); *Mouell v. Local No. 7635*, 81 F. Supp. 151 (S.D. W.Va. 1948); and *Gualtieri v. Sperry Gyroscope Co.*, 67 F.Supp. 219 (E.D. N.Y. 1946).

Here there was not the slightest proof that any of the petitioners at any time was employed by any of the numerous respondent employers. How then could the Courts below have lawfully determined by which of these respondents each or any of the petitioners were permanently employed? Obviously the decisions below, upon the evidence adduced, were therefore in all respects lawful.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,



ROBERT EIKEL,
*Counsel for Respondents*
Stevedoring Company Members
of West Gulf Maritime
Association
1442 Esperson Building
Houston, Texas 77002

EIKEL & DAVEY,
*Of Counsel*